FILED
JAN 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 822

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.

Subject Index

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Summary Statement of the Matter Involved	2
Questions Presented	7
Reasons Relied on for Allowance of the Writ	8
BRIEF IN SUPPORT OF PETITION	10
Jurisdiction	10
Statement of Facts	10
Specification of Errors	11
The Services	11
The Ouster of Judge Manton	13
ARGUMENT	
POINT I—When an allowance is sought for services to a private litigant, to be paid by a private litigant, and not to be paid from the receivership estate, the amount of the allowance is not controlled by benefit to the receivership estate	14
POINT II—When similar applicants in the same cause and in other receivership causes had not been restricted to the rule of benefit to the receivership estate it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to do so in determining the allowance to Mr. Franklin	19
POINT III—When the parties, the Special Master and the District Court had concurred in the meaning and intent of Article Six (6) it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to adopt a wholly different construction	20
Note	22
CONCLUSION	23

Table of Cases Cited

PAGE

Atlas Ry. Supply Co. v. Lake & River Railway Co., 134 Fed. 503, 505 (D. C.) 15

Clark v. Goldman, 124 F. (2d) 491 (C. C. A. 2d) 8, 16
Crump v. Ramish, 86 F. (2d) 362 (C. C. A. 9th) 8, 16

Ex parte Manhattan Railway Co. (U. S. Supreme Court, unreported) 13, 14

Franklin v. City of New York, 144 F. (2d) 571 10

Hawes v. Oakland, 104 U. S. 450 4
In re Hollis Lumber Co., 55 F. (2d) 898 (C. C. A. 2d) 15

Jacobson v. General Motors Corp., 22 F. Supp. 255 4
Johnson v. Manhattan Railway Company, 289 U. S. 479 ..... 2, 13

Louisville &c. R. R. Co. v. Wilson, 138 U. S. 501, 509 15

Manhattan Railway Co. v. City of New York, 144 F. (2d) 571 10

Nolte v. Hudson Navigation Co., 47 F. (2d) 166, 167 ..... 8, 16

165 Broadway Building v. City Investing Co., 120 F. (2d) 813, 816 (C. C. A. 2d) 18

Palmer v. Watson, 122 F. (2d) 598, 600 ..... 8, 16
Priest v. Wells, 282 Fed. 57, 60 (C. C. A. 8th) 15

Sprague v. Ticonic Bank, 307 U. S. 161 ..... 8, 15, 16
Sprague v. Ticonic Bank, 110 F. (2d) 174 (C. C. A. 1st) 8, 16
Straus v. Baker Co., 87 F. (2d) 401, 410 (C. C. A. 5th) 15

Taylor v. Holmes, 127 U. S. 489 4

Venner v. Great Northern Railway Co., 153 Fed. 408 (D. C.) 4

Walker v. L. Maxey, Inc., 103 F. (2d) 24, 26 (C. C. A. 5th) 15
Warren v. Palmer, 132 F. (2d) 665, 668 (C. C. A. 2d) 16

Table of Statutes Cited

Judicial Code, Section 240-A 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(Italics and bracketed matter in quotations ours.)

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above cause.

Summary Statement of the Matter Involved [1]

This Court is asked to review the determination below which in effect denies any compensation to petitioner, Charles Franklin, for services rendered as the general counsel of Manhattan Railway Company, and its solicitor in the Interborough-Manhattan receivership (August 26, 1932 to June 12, 1940), the petitioner having devoted substantially his entire time over the 8-year period to such representation.

The outcome of petitioner's work was that the equity of Manhattan Railway Company, admittedly in a perilous position and regarded as worthless from the outset, was liquidated for $12,096,160.

The services were performed under agreement by resolutions adopted annually by Manhattan's board of directors to pay $15,000 per annum as fixed salary for the general counsel work (fols. 388-90, 368, 943) on which obligation $90,000 is due. The solicitor work was performed under formal agreement and resolutions to pay petitioner $250,000 for the services rendered during said receivership period (fols. 442-3, cf. fols. 3872-4, 3899-902) on which obligation $230,000 is due.

There is in present bank custody two reserve funds created by Manhattan stockholders to pay Manhattan Railway Company's legal compensation and expenses, in which there is available a balance in excess of $500,000 (fol. 372). Approximately 99% of the $12,096,160 were immediately distributed to the stockholders in 1940, the balance being held for legal and miscellaneous expenses (fols. 6568-9). The Committee and their counsel and other expenses have long since been paid out of the reserve funds.

The District Court allowed petitioner a total of $20,000 for all solicitor work performed over the receivership period

[1] The authority of former United States Circuit Judge Martin T. Manton to appoint receivers of the Interborough and Manhattan properties was sustained by this Court in *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479, in which petitioner attacked the jurisdiction of former Circuit Judge Manton.

on the theory that only services which benefited the receivership estate should be allowed, the Court declining to recognize corporate obligations or benefit to Manhattan Railway Company and its stockholders. No such restriction was applied to the other claimants who were similarly situated. This allowance represents one-fifth of petitioner's overhead office expense and leaves nothing but a heavy deficit for the services (see Petitioner's Ex. 124, p. 1940). Approval of $250,000 fees requested for solicitor services was given by formal resolutions (fols. 306-7, 3901-2), by letters from all the directors admitted in evidence (fols. 6181-6204), and by a majority of the Company's directors who also appeared as witnesses (fols. 514-5, 3240-2, 2384-5, 2430, 2444, 2498, 3146, 2454-5).

Since no allowance was made for the general counsel work the District Court on a subsequent application granted a total of $15,000 upon the liquidated claim of $90,000. The City offered no appraisal either of the general counsel or the solicitor services. The figure of $15,000 is the aggregate of $2,000 for 7½ years and was suggested by the Master (fol. 6741) who substituted his opinion for that of Circuit Judge Mack (fol. 6576) and the considered judgment of Manhattan's board of directors. In making the recommendation the Master explained: "I may not have a true picture of the situation or the value of the services rendered as general counsel" (fol. 6741).

Both allowances, and all payments made to petitioner of every nature, including payment during receivership for the work of transfer of the Company's stock and bonds, as well as his interest in the fee paid to counsel for the Modified Stock Committee, do not meet petitioner's out-of-pocket office overhead expense incurred in these matters. The District Court expressly so found (fols. 7294-5).

The stockholders of Manhattan Railway Company freely consented to the creation of the existing reserve funds. All of the Company's stockholders were informed by letters sent during the receivership, of the important prob-

lems and pending litigated matters, and of petitioner's labors on their behalf, while the Board resolutions, including those authorizing payment for his services, were read at the annual stockholders' meetings (fols. 2388, 2397-8, 2499, 2551). Nevertheless not one penny has been contributed from these reserve funds to pay petitioner's claim for his services rendered on behalf of the equity.

The net result of the action of the Court below is to deny any compensation whatsoever either for petitioner's services as Manhattan Railway Company's general counsel, or as its solicitor.

The only opposition to payment from the reserve funds comes from the City of New York, appearing solely as a holder of Manhattan stock, the City having acquired its shares long after petitioner's services were completed.[1]

The Protective Committees for Manhattan's two classes of stock filed supporting briefs in the Court below indicating their willingness that petitioner's fees should be paid out of the existing reserve funds.[2]

---

[1] In moving to strike out the appearance of the City of New York upon the ground that it had no standing to object (*Taylor* v. *Holmes*, 127 U. S. 489; *Hawes* v. *Oakland*, 104 U. S. 450; *Venner* v. *Great Northern Ry.*, 153 Fed. 408 (S. D. N. Y.); *Jacobson* v. *General Motors Corp.*, 22 F. Supp. 255 (S. D. N. Y.), it was said:

> "Mr. Franklin: If it shall be contended that the City of New York is not appearing in this proceeding as a stockholder, but as a purchaser——
>
> Asst. Corporation Counsel Gaud: It won't be" (fol. 3403).

[2] Counsel for the Protective Committee for Manhattan Company's 7% Stock stated in their brief filed in the Court below: "The Committee for the 7% Stock does not object to a further allowance to Mr. Franklin * * * Mr. Watson, chairman of the Committee, and Mr. Joyce, vice-chairman, both testified as individuals that they thought the additional allowance sought by Mr. Franklin should be granted (fols. 2385, 3240-2). If any allowance to Mr. Franklin for services rendered Manhattan Railway Company is to be charged to the stockholders of the Company, then any such allowance should be prorated between the two groups of stockholders." Counsel for the Protective Committee for Manhattan Company's 5% Stock filed brief in the Court below to same effect.

In so far as the Manhattan stock is concerned, there is thus no opposition from anyone for whose benefit the services were rendered.

All of the lines of railroad, properties, including power houses, equipment, etc., were transferred to the City of New York under the terms of the so-called Plan of Unification by decree of the District Court dated June 12, 1940.

Two paragraphs of the Plan of Unification were inserted to provide the source from which petitioner was to be paid for his services, namely:

Article Six, paragraph 8, of the Plan, provides that the City of New York "will assume all debts and liabilities of and claims and demands against the Interborough Company or *the Manhattan Company*, contingent or otherwise * * * Without limiting the generality of the foregoing, the City shall assume * * * (d) * * * allowances, if any, which may be made by the District Court to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings" (Plan, p. 47).

As the Unification Plan involved the cessation of Manhattan's existence as a going concern, petitioner for his protection insisted in a series of letters to the special counsel for the Transit Commission and the City representative in drafting the Plan, that the reference to himself be inserted as Article Six, 8(d) of the Plan (fols. 1403-20, 5777-809). The purpose of the clause was explained as protection of his "right to be paid for services rendered as solicitor of Manhattan * * * for my services as general counsel of the Company" (fol. 5786); also for his services in related proceedings (fol. 5800, cf. fols. 5778-9), and direct allusion was made to the existing applications (fol. 5800) as setting forth the services which were to be covered by the clause (fols. 5799-800). Mr. Cuthell conceded the inclusion of the clause (fol. 1422).

Article Six, paragraph (6) of the Plan provided: "*The legal*, accounting, engineering *and other expenses and compensation of the Manhattan Railway Company* (except as

otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), whether heretofore or hereafter agreed to be paid or whether heretofore or hereafter incurred in the receivership proceedings * * * " shall be paid from the securities and cash allocated to the stockholders of the Manhattan Railway Company (Plan, p. 45).

The City of New York, acting by its Assistant Corporation Counsel Gaud, insisted before the District Court that petitioner's services "were clearly rendered on behalf of Manhattan and of its stockholders" and that "he should be compensated by his client" (fols. 319-20), again saying, "I think it is enough to say that he was representing the stock of the Company" (fol. 323). The City thus succeeded in having its position sustained by the District Court (fol. 330). Then when petitioner proceeded under Article Six, paragraph (6), the City decided to oppose on general principles, although admitting in a sworn document submitted in opposition that Article Six, paragraph (6), was inserted for the express purpose, consented to by all concerned, of enabling petitioner to enforce his outstanding agreements with the Manhattan Railway Company for payment of his services (fols. 479-82).

The opinion below does not discuss the legal principles advanced in brief and argument believed to be applicable and determinative of the issues. Instead the Court in effect takes away both sources provided in the Plan for payment of petitioner's compensation by what we believe to be an incorrect interpretation of Article Six, paragraphs (6) and 8(d), that is contrary to the expressed understanding of both sides, including the City's counsel who drafted these provisions of the Plan, as well as of other counsel who participated in its preparation (fols. 479-82).

Inasmuch as Manhattan's stockholders who might have a residual interest in the reserves are scattered throughout the world, the premature dispersal of the funds would leave petitioner in a most precarious position.

The Circuit Court of Appeals decision:

(1) On the appeal from the decree involving the application under Article Six (8)(d), sustained the construction of the District Court that the claim against the Manhattan Railway Company assumed by the City of New York should be liquidated on the theory of benefit to the receivership estate.

(2) On the appeals from the decree involving the application under Article Six (6), contrary to the position taken by both parties and contrary to the findings of the Special Master and the District Court, held that petitioner could take nothing under paragraph (6) because his claim as general counsel and solicitor "was expressly excepted therefrom". The Circuit Court of Appeals did, however, transfer the additional $15,000 from the award under paragraph (6) to the award under paragraph (8)(d).

Questions Presented

(1) When an allowance is sought for services to a *private litigant,* to be paid by a *private litigant,* and *not* to be paid from the receivership estate, is the amount of the allowance controlled by benefit to the receivership estate?

(2) Was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to apply the rule of benefit to the receivership estate in determining the allowance for petitioner when similar applicants in the same cause and in other receivership causes have not been so restricted?

(3) When the parties, the Special Master and the District Court have concurred in an ultimate fact as to the meaning and intent of a contract, was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to disregard this fact and adopt a wholly different construction of the contract?

Reasons Relied on for Allowance of the Writ

1. The restriction to benefit to the receivership estate of the allowance for services to a private litigant and *not* to be paid from the receivership estate is in conflict with applicable decisions of this Court, *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, decisions of other Circuit Courts of Appeals, *Sprague* v. *Ticonic Bank,* 110 F. (2d) 174 (1st Circuit) and *Crump* v. *Ramish,* 86 F. (2d) 362 (9th Circuit), as well as prior decisions of the Circuit Court of Appeals of the Second Circuit itself, *Clark* v. *Goldman,* 124 F. (2d) 491, and *Nolte* v. *Hudson Navigation Co.,* 47 F. (2d) 166.

2. The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in

(a) restricting petitioner to the theory of benefit to the receivership estate in determining the allowance of this petitioner when under comparable circumstances the Court had in the Interborough-Manhattan receivership itself, in *Palmer* v. *Watson,* 122 F. (2d) 598, held that benefit to the class represented was the criterion, and the District Court, also in the Interborough-Manhattan receivership, had made allowances assumed by the City, also by Article Six (8) of the Plan, on the theory of benefit to clients and without restriction to benefit to the receivership estate, and

(b) disregarding the construction placed on Article Six (6) of the Plan by the parties, the Special Master and the District Court that petitioner was entitled thereunder to compensation for services.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the decrees of the Circuit Court of Appeals for the Second Circuit in the above causes and that the said decrees be reversed.

New York, January 9, 1945.

Respectfully submitted,

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION

The opinion of the District Court has not been reported. The opinion of the Circuit Court of Appeals is reported at 144 F. (2d) 571.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 18, 1944, following the denial of a petition for rehearing or modification of the opinion on October 9, 1944 (pp. 2465, 2467). The jurisdiction of this Court is involved under Section 240-A of the Judicial Code as amended by the Act of February 13, 1935.

Statement of Facts

The relevant facts are stated in the respective Point headings.

Specification of Errors

It is submitted that the Court below erred:

(1) In holding that petitioner's claim against the Manhattan Railway Company assumed by the City of New York under Article Six (8)(d) should be allowed only to the extent of benefit to the receivership estate.

(2) In overruling the construction of Article Six (6), agreed upon by the parties and found by the Special Master and the District Court, that petitioner was entitled to compensation thereunder for his services to the Manhattan Railway Company to the extent not compensated under Article Six (8)(d).

As stated in the petition, and as hereinafter more fully demonstrated, the Court below decided the cause in conflict with the applicable decisions of this Court and other Circuit Courts of Appeals and departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

The Services

A brief statement will suffice to show a startling disproportion between petitioner's work and accomplishments as contrasted with the compensation heretofore allowed.

Petitioner devoted something over seven and a half years as chief legal representative of the interests of the Manhattan Railway Company and its stockholders. As noted by Judge Hulbert, his office operating "loss [for the receivership period] is just about covered by the allowances" heretofore received (fol. 7295). Outstandingly successful results were achieved in difficult litigation lasting many years.

At the inception of his work the Manhattan Railway Company was in a most precarious condition. Its major tangible asset, the lease to the Interborough Rapid Transit

Company, was threatened with extinction, its lines and plants with demolition, all its properties with foreclosure. The situation was deemed "hopeless" by competent parties, such as Mr. Richard E. Dwight, member of the firm then representing the Manhattan receiver (fol. 497).

Up to May 15, 1940 there had been 63 written opinions by the District Court, 474 orders and 804 documents. The printed record comprises 15,143 pages; the stenographic minutes over 20,000 pages, including several special proceedings referred to various Special Masters—as the Roberts removal proceedings, the Formula litigation, Claims, Foreclosures, etc. There were many lengthy controversies, almost all affecting the Manhattan Company directly or indirectly. Petitioner participated actively. His office diary (Pet. Ex. 115), occupies 274 pages of this record, pp. 1607-1881. He attended 258 hearings (Pet. Ex. 117, fols. 5681-5703). His briefs on the important issues were put in evidence. Petitioner's Exhibit 116, folios 5644-80, lists 72 arguments which he made.[1] The Special Master who took a narrow concept of the nature, extent and effectiveness of petitioner's solicitor work takes up 26 pages of his Report on services involved in the proceedings. In his capacity as

[1] The work included many appeals in which petitioner took the laboring or at least one of the oars. The published reports show petitioner's participation in *Johnson* v. *Manhattan Railway Co.*, 289 U. S. 479, 61 Fed. (2d) 934, 1 Fed. Supp. 809; *Roberts* v. *City of New York*, (42nd Street Spur Case), 295 U. S. 264; *Matter of City of New York*, 265 N. Y. 170; *Murray* v. *Roberts* (Disaffirmance litigation), 103 Fed. (2d) 889, cross-application to Supreme Court for certiorari (No. 552, October Term, 1939) in which petitioner filed separate brief withdrawn upon assurance of Unification; *City of New York* v. *Murray*, 273 N. Y. 447, 248 App. Div. 102; *American Brake Shoe & Foundry Co.* v. *Interborough Co.*, 10 Fed. Supp. 512; *City of New York* v. *Interborough Co.*, 76 Fed. (2d) 1002, 10 Fed. Supp. 512; *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.* (Sale of Manhattan's Sixth Avenue Line), 99 Fed. (2d) 789, certiorari denied 306 U. S. 641. Appeals were also perfected and briefed in the Federal and State Courts, but which were not reported, as in the case of *Transit Commission* v. *Manhattan Railway Co.* (Signal application) before the Appellate Division of the State Supreme Court (fol. 1152), etc.

general counsel petitioner carried on a large volume of corporate office work described at folios 41-105, and folios 802-38.

The struggle was a legal one, and Mr. Cuthell, special counsel for the Transit Commission, agent for the City in unification, has attested petitioner's skill, tenacity and assistance "in the very difficult matter of representing the Manhattan stock * * *" (fol. 5816).

The Special Master found that "There was no dispute but that Franklin spent most of his time during the receivership proceedings on Manhattan and receivership matters * * * For the most part the fact that Mr. Franklin performed such services has not been opposed" (fols. 6713-14, 6635).

The Ouster of Judge Manton

We mention these proceedings, which constituted in point of time only a relatively minor part of petitioner's services, because they came to the attention of members of this Court and show the courage and originality of his work.

It is no reflection on the other able attorneys active in the receivership to say that the only really notable legal effort in the entire proceeding was petitioner's ouster of Judge Manton. After Judge Manton injected himself into the case, under circumstances which in petitioner's view were prejudicial to his client, he was sufficiently courageous to attack Judge Manton's jurisdiction in a suit decided by this Court in *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479. Although this Court sustained Judge Manton's authority it criticized his exercise of his jurisdiction and admonished him to relinquish it. When Judge Manton refused to do so petitioner commenced a proceeding in this Court, entitled *Ex parte Manhattan Railway Company*, for a writ of prohibition against Judge Manton's continuance in the case, the petition reciting Judge Manton's arbitrary conduct. An asso-

ciate of petitioner procured a restraining order from Mr. Chief Justice Stone, then an Associate Justice. Petitioner opposed before Mr. Justice Stone the motion of counsel for the Interborough and Manhattan receivers to vacate this restraining order. When Mr. Justice Stone, without finally ruling, indicated his dissatisfaction, Judge Manton voluntarily withdrew, immediately prior to the argument in this Court of the application for the writ of prohibition.

POINT I

When an allowance is sought for services to a private litigant, to be paid by a private litigant, and not to be paid from the receivership estate, the amount of the allowance is not controlled by benefit to the receivership estate.

The obligation of the City of New York, held by the Courts below to be limited by the "principle" of "benefit to the receivership estate", is expressed in Article Six (8) of the Unification Plan, reading in part as follows:

> "(8) Except as otherwise expressly provided in paragraph (5) of this Article, the City, on the date of consummation, will assume all debts and liabilities of and claims and demands against the Interborough Company or the Manhattan Company, contingent or otherwise, outstanding on or as of said date * * * Without limiting the generality of the foregoing, the City shall assume:
>
> "(d) * * * allowances, if any, which may be made by the District Court to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings; and allowances, if any, which may be made by the District Court to the solicitor for the Committee for the Ten-Year Unsecured 6% Gold Notes of the Interborough Rapid Transit Company of which Dwight F. Faulkner, Jr., is Chairman for services rendered to the receivership estates as distinguished from services rendered to said Committee;

> "(e) to the extent not paid pursuant to the provisions of Sections II and III of Article One hereof, allowances for the services and expenses of the Mortgage and Indenture Trustees, their counsel and engineers, as determined by the District Court, including allowances for services and expenses, if any, performed or incurred after the date of consummation * * *."

That a corporation in receivership may incur debt for legal services and otherwise has repeatedly been held, *Louisville &c. R. R. Co.* v. *Wilson*, 138 U. S. 501, 509; *Priest* v. *Wells*, 282 Fed. 57, 60 (C. C. A. 8th); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 410 (C. C. A. 5th); *In re Hollis Lumber Co.*, 55 F. (2d) 898 (C. C. A. 2d); cf. *Walker* v. *L. Maxcy, Inc.*, 103 F. (2d) 24, 26 (C. C. A. 5th); *Atlas Ry. Co.* v. *Lake & River Railway Co.*, 134 Fed. 503, 505 (N. D. Ohio).

Petitioner seeks to liquidate this debt arising from the legal services and collect it from the City of New York under Article (8)(d), *supra*, or under paragraph (6).

The Court below ruled that the liquidation must be "in accordance with the principle which controls the allowance of counsel fees in receivership cases, namely, benefit to the receivership estate" (p. 2449).

We respectfully submit that no such principle applies when the attorney is seeking not compensation from the receivership estate but a determination of the amount of his claim for services to a private litigant.

In *Sprague* v. *Ticonic Bank*, 307 U. S. 161, this Court sustained the right to an allowance of counsel in a receivership proceeding who had done nothing for the receivership estate as such, but had established a precedent of advantage to a number of creditors respecting their share of the receiver's assets. This Court said inter alia at p. 167:

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

Subsequently, in *Sprague* v. *Ticonic Bank*, 110 F. (2d) 174 (C. C. A. 1st), that Court expressly overruled the contention that because no benefit had accrued to a fund in court, counsel should receive no allowance, saying (at p. 176):

> "This asserted limitation upon the power of the court of equity to award reimbursement of counsel fees and expenses seems to us squarely in conflict with the decision of the Supreme Court in 307 U. S. 161."

In *Crump* v. *Ramish*, 86 F. (2d) 362 (C. C. A. 9th), an equity receivership, the claimant attorneys represented certain creditors who received securities pursuant to the reorganization plan. The attorneys applied for and received a fee of $25,000 from the receivership estate. They then applied for a fee to be paid from the securities allocated to their clients. The District Court dismissed the petition for want of jurisdiction but the Circuit Court of Appeals reversed and directed that the petition be considered on the merits.

In at least two cases the Circuit Court of Appeals of the Second Circuit has held that attorneys whose services do not benefit the estate as such, but do benefit one class of creditors at the expense of another class, are entitled to compensation from the class so benefited, and that the receivership court may fix the appropriate sum. *Clark* v. *Goldman*, 124 F. (2d) 491, 493; *Nolte* v. *Hudson Navigation Co.*, 47 F. (2d) 166, 167. The validity of such allowances was expressly recognized in *Warren* v. *Palmer*, 132 F. (2d) 665, 668.

The same result was reached by the Court in *Palmer* v. *Watson*, 122 F. (2d) 598, another allowance proceeding in the Interborough-Manhattan receivership itself. There the Court said (at p. 600) that the allowance must turn "on what was done that was beneficial", but the claimant attorneys for the Manhattan 7% Stock Committee asserted no benefit to the receivership estate, only benefit to the 7% Stock.

In none of these receivership cases was the principle of benefit to the receivership estate applied in determining counsel's allowance.

The Unification Plan as matters of language and of practice did not limit the allowance to benefit to the receivership estate.

1. *As a matter of language.* Paragraph (8) deals with claims against Interborough and Manhattan Companies. The only limitation is that applicable to the counsel for the Interborough 6% Note Committee, whose allowance, unlike petitioner's, was restricted to "services rendered to the receivership estates as distinguished from services rendered to said Committee". Not only the absence of any limiting language in the reference to petitioner, but the positive inclusion of such language in reference to the Committee attorney, emphasize the agreement that the claim be recognized and paid.

Also, Article Six, paragraph (5), provides that the City will *not* assume or pay:

> "(d) Any legal, accounting, engineering or other expenses or compensation of * * * Manhattan Railway Company, *other* than any allowance which may be made * * * pursuant to the provisions of subdivision (d) of paragraph (8) of this Article * * *" (Plan, p. 44).

Plan Definition No. (5) provides:

> "* * * The term 'Manhattan Railway Company' shall mean the corporation itself and shall not include its receiver or the receivership estate" (Plan, p. 3).

Thus Article Six (5) treated (8)(d) as relating to a claim against the Company and not a claim against the receivership estate.

2. *Ordinary claimants.* All ordinary claimants against the two companies have been paid in full on the basis of

their claims against the companies.[1] Cf. *165 Broadway Building* v. *City Investing Co.*, 120 F. (2d) 813, 816 (C. C. A. 2d).

3. *Other attorneys.* Among the claims that the City assumed were listed, "without limiting the generality of the foregoing",

> (8) "(e) to the extent not paid pursuant to the provisions of Sections II and III of Article One hereof, allowances for the services and expenses of the Mortgage and Indenture Trustees, their counsel * * *" (Plan, p. 48).

The exception to "contracts or agreements relating to the employment of counsel" mentioned at page 2448 of the opinion below, obviously referred to Interborough's many outstanding contracts with counsel engaged in negligence and other carrier activities, since under the terms of the Manhattan lease, Interborough had sole charge of and responsibility for Manhattan's litigation from January 1, 1903, the effective date of said lease.

No reason has been suggested why the allowances provided in (e) should be measured differently from petitioner's. Nevertheless substantial allowances were made on applications making no pretense of benefit to the receivership estate.

Sections II and III of Article One authorized payment of allowances to the Trustees and their counsel from funds in their possession before the balance was turned over to the City (Plan, pp. 13-15). These funds sufficed for the allowances to the respective first mortgage trustees, Central Hanover Bank and Guaranty Trust Company (R. R. 14431-2, 14879). The Chase National Bank of the City of New York, Trustee of the Manhattan Second Mortgage,

---

[1] This does not appear in the record, but we have been so informed by attorneys for the principal claimants. In the Court below the City did not deny this assertion on our part that ordinary claimants had been so paid.

had no funds on hand, and Bankers Trust Company, Indenture Trustee for the Interborough 7% Notes, had only negligible cash. Not being able to recover compensation under Sections II and III of Article One it was necessary for them to seek relief under paragraph (8). This they did. The Chase National Bank and its counsel Messrs. Milbank, Tweed & Hope, and Bankers Trust Company and its counsel Messrs. White & Case, submitted petitions for allowances in which there was not the slightest suggestion of benefit to the receivership estate, but there were, on the contrary, set forth services to their respective security holders (R. R. 14333-50, 14480-502). These applications were allowed in substantial amounts (fols. 353, 356). At no time has either the City or either of the Courts below suggested the slightest basis for differentiation between these trustees and their counsel on the one hand and petitioner on the other.

POINT II

When similar applicants in the same cause and in other receivership causes had not been restricted to the rule of benefit to the receivership estate it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to do so in determining the allowance to petitioner.

The facts on which this Point is based are stated in Point I.

POINT III

When the parties, the Special Master and the District Court had concurred in the meaning and intent of Article Six (6) it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to adopt a wholly different construction.

Petitioner asserted that if (8)(d) is to be construed as imposing upon the City only his claim against the receivership estate, then his claim against the Company should be liquidated under Article Six (6) providing that:

> "The legal, accounting, engineering and other expense and compensation of the Manhattan Railway Company (except as otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), *whether heretofore or hereafter agreed to be paid* [1] * * * " (Plan, p. 45).

should be borne by the securities and cash allocated to the Manhattan stockholders.

It seems self-evident that if (8)(d) means only the obligation of the receivership estate, the obligation of the Company is not excepted by the parenthetical clause and is covered by paragraph (6). Paragraph (6) does not except petitioner; it excepts what (8)(d) provides as to petitioner, whatever that may be.

Although the City of New York, the Special Master and the District Judge all maintained that paragraph (6) did cover petitioner's services to the Company and not otherwise compensated, the Circuit Court of Appeals held he could take nothing under paragraph (6) irrespective of inadequacy of other compensation.

---

[1] Italicized language omitted in the quotation from this paragraph by the Court below (p. 2449).

The City's construction of paragraph (6) was expressed in the District Court by the affidavit of Assistant Corporation Counsel Gaud as follows (fols. 479-82):

> "11. * * * Mr. Reavis and Mr. Franklin pointed out that, as concerned their allowances which were to be charged against the corporate stock and cash going to the stockholders, certain resolutions had already been adopted by the Manhattan Board of Directors respecting the amount of compensation to which the Board thought they were entitled. Article Six, paragraph 6, was accordingly changed at their suggestion so as to make it clear that legal expenses of the Manhattan '*whether heretofore or hereafter agreed to be paid*' (these words were emphasized in Mr. Gaud's affidavit by underlineation), were chargeable against the Corporate Stock going to the stockholders.
>
> "12. * * * before preparing this affidavit, I discussed the matter of how these changes came to be made in the Plan with some of the other lawyers who were present at the time, and they confirm what is here stated.
>
> "13. * * * As to paragraph 6 of Article Six, express language was included so as to let Mr. Franklin try to take advantage of the agreement with the Board of Directors when he went against the stockholders."

Mr. Gaud's affidavit is all the City filed in answer to the supplemental petition and is in the nature of a pleading, stating the City's theory of the case (fols. 464-83).

Even in the Circuit Court of Appeals the City conceded liability under paragraph (6), although contending that the liability had already been discharged. The City said (Brief, p. 13):

> "Under the Plan, assenting stockholders were liable for legal services, not under contracts made with Manhattan, but to the extent of the worth of such services as were beneficial to them and as determined by the District Court."

The Special Master found that Article Six (6) covered the services to the Company (fols. 6750-3). The District Court (Hulbert, D. J.) necessarily found that petitioner's services to the Company came under Article Six (6) by allowing $15,000 on the supplemental petition.

Responsibility for the grave miscarriage of justice in this cause: The services are based on undisputed written evidence and there was no issue of evidentiary fact in the case.

Up to the date that the petitioner filed his application for allowance there was no suggestion of criticism. As noted above, Mr. Cuthell commended petitioner's skill, tenacity and assistance "in the very difficult matter of representing Manhattan stock * * *" (fol. 5816). In the City's briefs before the Court below involving other parties the City uniformly spoke well of petitioner's work.[1]

The City being unable to meet the issues, indulged in a vindictive personal attack upon petitioner for which there was no justification.

Petitioner was admitted to the Bar May 11, 1903; he has had an active successful career before the Federal and State Courts.

---

[1] For example, the City's brief in the *Palmer-Watson* case (122 F. (2d) 598), states in discussing the services of other counsel in the Formula and Disaffirmance litigations: "They followed the lead of others who represented far more substantial interests. In the Formula and Disaffirmance proceedings, and in all proceedings relating thereto, *the laboring oars were taken by * * * Manhattan Railway Company itself*" (fol. 7019), that is, by the petitioner.

In another brief (122 F. (2d) 552), referring to *Ex parte Manhattan Railway Co.*, the City says: "Mr. Boehm assumes throughout his brief that his standing is identical with Mr. Franklin's. That is, of course, not the case" (p. 23).

We quote excerpt from the City's brief in the Court below to illustrate their bias and impropriety:

> "In his attempt to obtain an allowance in this proceeding, Franklin's conduct and testimony were calculated to mislead the Court. Consequently he forfeited any right to an allowance."

The above calumny was set up as a separate point, and upon counsel's unsupported opinion, the City virtually demanded the denial of petitioner's right to compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, New York, January 9, 1945.

Respectfully submitted,

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.

Office - Supreme Court, U. S.
FILED
FEB 5 1945
CHARLES ELMORE CROPLEY
CLERK

(30628)

Supreme Court of the United States

October Term, 1944. No. 822.

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,

Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

January 29, 1945.

IGNATIUS M. WILKINSON,
Corporation Counsel,
Solicitor for the City of New York.

LEO BROWN,
LOUIS M. WEINTRAUB,
BENJAMIN OFFNER,
of Counsel.

TABLE OF CASES

American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co., 122 F. (2d) 454, cert. den. *sub nom.* Manheim v. Merle-Smith, 315 U. S. 801 ..... 2, 7

Bethlehem Steel Co. v. International Combustion Engineering Corp., 66 F. (2d) 409 7

Cake v. Mohun, 164 U. S. 311 8

Dickinson Industrial Site, Inc. v. Cowan, 309 U. S. 382 8

Duffy v. Colonial Trust Company, 287 Pa. 348, 135 Atl. 204, cert. den. 273 U. S. 765 10

In re Bush Terminal Co., 84 F. (2d) 984 7

In re Carr, 116 Fed. 556 10

In re Insull Utility Investments, Inc., 74 F. (2d) 510 7

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Summary Statement of Facts 2

Allowances made to petitioner 3

Argument:

Under the unification plan all allowances to counsel were to be fixed in the discretion of the court. The action of the courts below in fixing the allowances to petitioner constituted a reasonable exercise of discretion 5

Conclusion 11

PAGE

In re McCrory Stores Corporation, 91 F. (2d) 947, cert. den. *sub nom.* Cooper v. Irving Trust Co., 302 U. S. 725 7

In re Memphis Street Ry. Co., 28 F. Supp. 358, rev'd on other grounds *sub nom.* Fuller v. Memphis Street Ry. Co., 110 F. (2d) 577 8

In re Thomasson's Estate, 347 Mo. 748, 148 S. W. (2d) 757 10

In re Trans-State Oil Co., 24 F. Supp. 454, rev'd on other grounds *sub nom.* Zweifel, Tuohy & Crager v. Trans-State Oil Co., 99 F. (2d) 650 8

Johnson v. Bankers Trust Co., 122 F. (2d) 552 7

Manhattan Railway Co. v. Central Hanover Bank & Trust Co., 99 F. (2d) 789, cert. den. 306 U. S. 641 2

Murray v. Roberts, 103 F. (2d) 889 2

Palmer v. Watson, 122 F. (2d) 598 7

Silver v. Scullin Steel Co., 98 F. (2d) 503 7

Stuart v. Boulware, 133 U. S. 78 8

Trustees v. Greenough, 105 U. S. 527 8

Trustees Corporation v. Kansas City M. & O. Railway Company, 26 F. (2d) 876 8

Wright v. City National Bank & Trust Co., 104 F. (2d) 285 7

Other Authorities Cited

5 Am. Jur., "Attorneys at Law", §169, p. 363 10

Borah Act, 28 U. S. C. §572a 8

Supreme Court of the United States

October Term, 1944. No. 822.

CHARLES FRANKLIN,
Petitioner,

vs.

THE CITY OF NEW YORK,
Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,
Petitioners,

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,
Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner Charles Franklin, as attorney for Manhattan Railway Company (hereinafter referred to as "Manhattan"), seeks review of an order of the Circuit Court of Appeals, Second Circuit, affirming allowances of $35,000 to him for services rendered on behalf of Manhattan and for the benefit of the receivership estate in the Interbor-

ough-Manhattan receivership proceeding (R. 2467). In addition petitioner had previously received allowances aggregating $57,500 for such services in that proceeding (R. 123, 1009). Thus he has received allowances aggregating $92,500.

The allowances of $35,000, which petitioner asks this Court to review, were made in the discretion of the District Court and the Circuit Court of Appeals in an equity receivership, and in making them the Courts below exercised a reasonable and sound discretion. No question is presented, therefore, justifying review by this Court.

Summary Statement of Facts

In the Interborough-Manhattan receivership proceeding,* the Manhattan Receiver and the Trustee of the Manhattan Consolidated 4% Mortgage were represented by separate counsel from the outset (R. 2213). The Manhattan Consolidated 4% Bondholders' Committee (Merle-Smith Committee), the Palmer Committee for Manhattan 7% Stock, and the Trustee of the Manhattan Second Mortgage, all intervened early in the proceeding and each was represented by counsel (R. 2213-2214). All of these received allowances (R. 117-120, 161). On November 11, 1932, petitioner was elected Manhattan's general counsel, and on January 30, 1933, he became its solicitor (R. 121, 122). He also served as counsel to the Manhattan 5% Stockholders' Committee until 1938, and from then on as co-counsel (R. 2214).

* The history of the receivership proceeding and the nature of the legal relations among Interborough, Manhattan, their respective security holders, and the City of New York, are fully set forth in *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.*, 99 F. (2d) 789 (1938), cert. den. 306 U. S. 641 (1939); *Murray* v. *Roberts*, 103 F. (2d) 889 (1939); *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454 (1941), cert. den. *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942), and in the interest of brevity will not be restated here.

In August 1940, after petitioner had received allowances aggregating $77,500, he filed a supplemental petition seeking an additional allowance (R. 121-129). In order to determine whether he was entitled to any further allowance, the District Court referred this question to a Special Master. The Circuit Court of Appeals has pointed out that the Special Master "took a vast amount of evidence and made a lengthy and detailed report" (R. 2450). After a full analysis of the evidence upon every item of services claimed to have been rendered (R. 2212-2238), the Special Master concluded that petitioner "secured very few ascertainable benefits for the equities which he represented" (R. 2248). As the Special Master found in connection with each of the claimed services, petitioner's activities were mainly duplicative of the efforts of the parties who had, and actually fulfilled, the primary responsibilities of protecting Manhattan's interests, such as the receiver, his counsel, the various protective committees and their counsel (see *e. g.*, R. 2216, 2219-2221, 2223, 2224, 2226, 2228, 2229, 2234-2236, 2238, 2248-2249). The Special Master reported that petitioner was not entitled to receive any further allowance, since he had already been fully compensated for all of his services (R. 2248, 2254-2255). None of the Special Master's findings was reversed by the District Court or the Circuit Court of Appeals. Both Courts, in the exercise of discretion, modified the report only by making an additional allowance of $15,000 to petitioner for his services as general counsel for Manhattan (R. 2430, 2432, 2434, 2450-2451).

Allowances Made to Petitioner

On December 10, 1934, petitioner received an allowance from Judge MACK, payable out of the receivership estate, of $3,000 a year for his services in connection with keeping the Manhattan corporate organization alive, aggregating $22,500 (R. 2207, 2236-2237). On June 24, 1940, Judge PATTERSON made an allowance of $70,000 to petitioner and his co-counsel for services rendered on behalf of Man-

hattan and its 5% Stock Committee, of which petitioner received $35,000 (R. 1009). This allowance was paid out of amounts allocated to the Manhattan 5% Stockholders under Art. Six, par. (6), of the Interborough-Manhattan Unification Plan (R. 1536-1580; 2250-2251, 2253-2254). No appeal was taken from this order.

On July 3, 1940, Judge PATTERSON allowed petitioner $20,000 in full for his services in the receivership cause, payable out of the receivership estate pursuant to Art. Six, par. 8(d), of the Unification Plan (R. 7-103, 110-113, 119, 120, 2253-2255). On an appeal taken by petitioner from this order, the Circuit Court of Appeals increased the allowance to $35,000 (R. 2467).

On August 29, 1940, petitioner filed a Supplemental Petition, seeking an additional allowance of $325,000, under Art. Six, par. (6), of the Unification Plan, payable out of the amounts allocated to Manhattan Stock, alleging the very same services for which Judge PATTERSON had already made the allowance of $20,000 (R. 121-129). It was this petition which the District Court referred to the Special Master (R. 162). Although the Special Master recommended no further allowance to petitioner, the District Court, without disturbing any of the findings, awarded petitioner $15,000 for general counsel services, payable out of the fund allocated to the Manhattan 5% Stock. This allowance was made upon the Special Master's statement that petitioner's services as general counsel were worth no more than $5,000 a year, upon which he already had been paid $3,000 a year (R. 2247, 2431-2434).

The Circuit Court of Appeals agreed with the District Court that petitioner be allowed the additional $15,000, but held that it was properly payable out of the receivership estate and not out of the funds allocated to the Stock. Therefore, it reversed District Judge HULBERT's order, and modified Judge PATTERSON's order by increasing the $20,000 allowance to $35,000 (R. 2450-2451, 2467).

Apart from alleged benefit to the receivership estate, petitioner also based his claim for a further allowance

upon alleged contracts with Manhattan providing for the payment to him of fixed fees (R. 1264, 1289-1291, 2046-2048). The Special Master found that no contract whatever existed for the payment of $250,000 to petitioner as Manhattan solicitor (R. 2244-2247), and that the contract to pay him $15,000 a year as general counsel was unenforceable (R. 2240-2244). The District Court did not enforce any agreement, and the Circuit Court of Appeals expressly held that any allowance to be made must be based, not upon contract, but upon benefit to the receivership estate (R. 2448-2450). Thus, the allowances which petitioner asks this Court to review were made in the discretion of the Court under the Unification Plan and in accordance with general principles governing allowances in equity receiverships, after unusually detailed and thorough consideration of all his services, with which the Court was fully familiar.

ARGUMENT

Under the Unification Plan all allowances to counsel were to be fixed in the discretion of the Court. The action of the Courts below in fixing the allowances to petitioner constituted a reasonable exercise of discretion.

(a)

Allowances to attorneys in the Interborough-Manhattan receivership proceeding were governed by the provisions of the Unification Plan. Though the Plan provides in Article Six, par. (3), that the City shall assume Manhattan's obligations under "Existing Agreements", this latter term is defined in definition (12) as excluding "contracts or agreements relating to the employment of counsel" (City's Exh. 58, p. 7 [Not printed pursuant to stip., R. 2441-2442]). Moreover, Art. Six, par. 5(d), provides that the City will not assume and pay (City's Exh. 58, pp. 43-44):

> "Any legal * * * expenses or compensation of * * * the Manhattan Railway Company, other than any allowance which may be made by the District Court pursuant to the provisions of subdivision (d) of paragraph (8) of this Article * * *."

Article Six, par. 8 (d), provides for compensation for services rendered to, and to be paid from, the receivership estate. The portion of the paragraph specifically referring to petitioner provides that the City will pay (City's Exh. 58, p. 47):

> "* * * allowances, *if any, which may be made by the District Court* to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings * * *." (Italics ours.)

Article Six, par. (6), also contains provision for compensation to Manhattan for its legal expenses, to be paid from funds allocated under the Plan to Manhattan Stockholders. The applicable portion of the paragraph provides (City's Exh. 58, p. 45):

> "The legal, accounting, engineering and other expenses and compensation of the Manhattan Railway Company (except as otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), *whether heretofore or hereafter agreed to be paid or whether heretofore or hereafter incurred* in the receivership proceedings or in securing assents to the Plan or in the negotiation and consummation of the Plan or otherwise, *all subject to the approval of the District Court*, shall be paid out of the Corporate Stock allocable under Article Four of the Plan to the Guaranteed 7% Stock and the Modified Guaranteed 5% Stock of the Manhattan Railway Company in the proportions determined by the District Court." (Italics ours.)

These are all of the provisions of the Unification Plan which controlled the allowances made to petitioner. It is clear, as the Circuit Court of Appeals held (R. 2448-2450),

that under the Plan, contracts for payment of legal services are unenforceable. Both under Art. Six, pars. (6) and 8 (d), all allowances were to be fixed in the discretion of the Court. They were to be governed by the general principles applicable in receiverships, namely, benefit to the receivership estate. *Palmer* v. *Watson*, 122 F. (2d) 598 (2nd Cir., 1941); *Johnson* v. *Bankers Trust Co.*, 122 F. (2d) 552 (2nd Cir., 1941). In applying these principles to the provisions of the Unification Plan, the Circuit Court of Appeals, in the instant case and in the cases cited above, followed the well-established rule that contracts for the payment of legal fees are unenforceable in receivership proceedings. See *In re Insull Utility Investments Inc.*, 74 F. (2d) 510 (7th Cir., 1935); *In re Bush Terminal Co.*, 84 F. (2d) 984 (2nd Cir., 1936); *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285 (6th Cir., 1939); *Silver* v. *Scullin Steel Co.*, 98 F. (2d) 503 (8th Cir., 1938); *In re McCrory Stores Corporation*, 91 F. (2d) 947 (2nd Cir., 1937), cert. den. *sub nom. Cooper* v. *Irving Trust Co.*, 302 U. S. 725 (1937); *Bethlehem Steel Co.* v. *International Combustion Engineering Corp.*, 66 F. (2d) 409 (2nd Cir., 1933).

Petitioner seeks to escape the consequences of this rule by asserting that Manhattan's stockholders are personally liable for the payment of legal fees under his alleged contracts with Manhattan. That position is untenable. Under the Unification Plan, Manhattan's assets were not purchased from the corporation, and the corporation received no payment for them. The Plan constituted an offer to individual security holders. When it was consummated, Manhattan was left without assets, and all payments were made directly to security holders. *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, *supra*, 122 F. (2d) 454, cert. den. 315 U. S. 801. In *Palmer* v. *Watson*, *supra*, 122 F. (2d), at p. 600, the Court refused to enforce a contract against stockholders upon the ground that "the payment by the City [to Manhattan's stockholders] were the proceeds of the receivership property in the custody of the court for distribution in accordance with the plan."

This case, therefore, differs from those cited by petitioner (Brief, p. 15), where contracts were enforced against the parties who made them when those parties survived reorganization with assets. Here, as the Circuit Court of Appeals noted (R. 2450): "the funds sought to be charged belong to the stockholders as such; they do not take them by distribution of corporation assets."

In any event, such contracts are unenforceable by reason of the provisions of the Borah Act (tit. 28, U. S. Code, § 572a). *In re Trans-State Oil Co.*, 24 F. Supp. 454 (Dt. Ct., Tex., 1938), rev'd on other grounds *sub nom. Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (5th Cir., 1938); *In re Memphis Street Ry. Co.*, 28 F. Supp. 358 (Dt. Ct., Tenn., 1939), rev'd on other grounds *sub nom. Fuller* v. *Memphis Street Ry. Co.*, 110 F. (2d) 577 (6th Cir., 1940).

(b)

Clearly, this is the usual case of allowances to counsel in a receivership proceeding, made in the discretion of the Court. The Court which had jurisdiction of the proceeding and in which the work was actually performed is peculiarly equipped to appraise the worth of the services performed by counsel. As has been said, such Court "has a fuller and better knowledge than any other court could possibly obtain of the extent and character of the services and of their value to the estate being administered." *Trustees Corporation* v. *Kansas City M. & O. Railway Company*, 26 F. (2d) 876, 880 (8th Cir., 1928).

Hence, the fixing of such allowances will not be disturbed unless there has been a clear abuse of discretion. *Trustees* v. *Greenough*, 105 U. S. 527, 537 (1881); *Stuart* v. *Boulware*, 133 U. S. 78, 81-82 (1890); *Cake* v. *Mohun*, 164 U. S. 311, 317-318 (1896); *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 388-389 (1940).

In the instant case, petitioner certainly has no meritorious complaint. Three separate District Courts passed

upon his allowances; a Special Master heard voluminous testimony; and the Circuit Court of Appeals reviewed the whole record. After such careful consideration, no further review by this Court is warranted.

(c)

Petitioner asserts (Brief, p. 22) that the City indulged in a "vindictive personal attack upon petitioner for which there was no justification", and quotes (Brief, p. 23) the following excerpt from our brief in the Court below: "In his attempt to obtain an allowance in this proceeding, Franklin's conduct and testimony were calculated to mislead the Court. Consequently he forfeited any right to an allowance". Petitioner claims that this was a "calumny", based upon "counsel's unsupported opinion" (Brief, p. 23).

Petitioner evidently overlooks the fact that the Special Master specifically found that he had attempted to mislead the Court and had given false and evasive testimony. The Special Master said (R. 2238-2240):

> "Under the circumstances of this proceeding, the probative value of the proof submitted by Franklin requires some comment. Aside from documentary evidence, Franklin was the principal and, with general exceptions, the only witness concerning the nature, extent and importance of his services. Upon cross-examination his credibility became seriously involved. Contrary to his testimony on direct and preliminary cross-examination that he had long and responsible legal experience in corporate, financial and advisory work for the Southern Pacific Railroad System, it was established that Franklin's experience up to 1930 had been almost entirely confined to the preparation and trial of litigated cases (S. M. 61-63, 823-830, 841-855 [fols. 566-70, 2107-2123, 2145-76]; City's Ex. 27). Moreover, his testimony as to the extent of the earnings from his law practice and the sources thereof, exclusive of his services for the Southern Pacific was unconvincing and, upon cross-examination, confused and evasive (S. M. 842, 843, 490-494 [fols. 2146-50, 1450-60]; Pet. Ex. 194). From examination of other

testimony and exhibits, I have concluded that Franklin's estimates of the value and importance of his services in the Receivership Proceedings were greatly exaggerated. This conclusion in and of itself would not necessarily affect his credibility. However, his entire testimony has been colored by other incidents which could not have been matters of opinion or mistakes. He has misled the Special Master as to the nature and extent of his services in Ex Parte Manhattan, he has contradicted himself, under oath, on the question of the parties behind him in the *Johnson* case (S. M. 539-543 [fols. 1557-68]). He has made inconsistent but seemingly expedient statements with regard to his alleged contracts with Manhattan and, on the same expedient basis, he has made many other inconsistent or misleading statements as to material facts which cannot be reconciled with what appears to be the real facts disclosed by the record. Finally, Franklin testified unequivocally that there was a meeting of the Manhattan Board of Directors on July 2, 1940. For reasons hereinafter set forth, it has been conclusively established, in my opinion, that no such meeting was held and the minutes of the meeting of the Manhattan Board of Directors purporting to report such a meeting are in fact false. For these reasons, among others, I have been unable to accept much of Franklin's testimony concerning the facts in issue and have found it necessary to check a substantial portion of such testimony against the printed record (R. R.) and the official stenographic minutes (R. M.) of the Receivership Proceeding."

Such conduct on Franklin's part was tantamount to a fraud on the Court which of itself would justify the denial of any allowance. Even where an attorney's misstatements or misrepresentations have been collateral rather than, as here, directly concerned with the issues involved, the courts have disallowed compensation. *Duffy* v. *Colonial Trust Company*, 287 Pa. 348, 135 Atl. 204 (1926), cert. den. 273 U. S. 765 (1927); *In re Carr*, 116 Fed. 556 (D. C., N. C., 1902); *In re Thomasson's Estate*, 347 Mo. 748, 148 S. W. (2d) 757 (1941); 5 Am. Jur., "Attorneys at Law", §169, p. 363.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 29, 1945.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Solicitor for Respondent,
The City of New York.

LEO BROWN,
LOUIS M. WEINTRAUB,
BENJAMIN OFFNER,
of Counsel.

(13)

Office - Supreme Court, U. S.
FILED
FEB 7 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 822

CHARLES FRANKLIN,
Petitioner,

vs.

THE CITY OF NEW YORK,
Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,
Petitioners,

vs.

THE CITY OF NEW YORK et al.,
Respondents.

PETITIONERS' REPLY BRIEF

February 7, 1945.

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.

SUBJECT INDEX

PAGE

I. The opposing brief does not deny (a) that its opposition to payment of petitioner's compensation is based on the theory that Article Six, paragraph 8-d of the Unification Plan covered only the liability of the receivership estate; or (b) that the District Court so decided, basing its allowance of $20,000 for eight years' work on the City's requested interpretation; or (c) that such construction was erroneous 1

II. The Court was prevented from exercising discretion in respect to petitioner's services by the City's insistence that any allowance to petitioner must be restricted to services directly benefiting the estate. Such demand necessarily excluded all of petitioner's general counsel work and virtually all solicitor services over the eight-year period 3

III. The City Brief (p. 8) has erroneously interpreted the Borah Act 5

IV. In reply to baseless personal attacks that have deprived petitioner of compensation for duly authorized continuous legal services which began over twelve years ago 6

TABLE OF CASES

In re Trans-State Oil Co., 24 F. Supp. 454, 457 5

Johnson v. Manhattan Railway Co., 295 U. S. 505 7

Palmer v. Watson, 122 F. (2d) 598, 600 4

Zweifel, Tuohy & Crager v. Trans-State Oil Co., 99 F. (2) 650 5

TABLE OF STATUTES

Act of Congress commonly called the Borah Act (tit. 28, U. S. Code, Sec. 572a) 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK et al.,

Respondents.

PETITIONERS' REPLY BRIEF

I. THE OPPOSING BRIEF DOES NOT DENY (A) THAT ITS OPPOSITION TO PAYMENT OF PETITIONER'S COMPENSATION IS BASED ON THE THEORY THAT ARTICLE SIX, PARAGRAPH 8-D OF THE UNIFICATION PLAN COVERED ONLY THE LIABILITY OF THE RECEIVERSHIP ESTATE; OR (B) THAT THE DISTRICT COURT SO DECIDED, BASING ITS ALLOWANCE OF $20,000 FOR EIGHT YEARS' WORK ON THE CITY'S REQUESTED INTERPRETATION; OR (C) THAT SUCH CONSTRUCTION WAS ERRONEOUS.

The failure to controvert our position set forth in Point I of our main brief (pp. 14-19), is virtually a confession of error. It shows that, under a correct construction of Article Six, paragraph 8-d, the City must be held to have assumed the liability of Manhattan Railway Company as such, and not merely the liability of the receivership estate.

The purpose of Article Six, paragraph 8-d, as specifically covering petitioner's services in question, was plainly declared in writing and understood by counsel in charge of unification for the City of New York, before the said clause was inserted in the Plan (fols. 5799-5800, 5786-7, 1422-3).

The City's default would appear to render academic alternative relief sought under Article Six, paragraph 6 of the Plan, although it is clear from the affidavit sworn to by Assistant Corporation Counsel Gaud that Article Six, paragraph 6 of the Plan was likewise inserted for the purpose of permitting petitioner to recover his fees out of the existing reserve funds created by Manhattan stockholders to pay the Company's legal compensation and expenses (fols. 479-82).

The City brief does not question Petitioner's Exhibit 124 (which we annex) showing that all payments to petitioner, including share of fees paid to counsel for the Modified Stock Committee, do not equal his office expense incurred in the litigated matters in question (cf. fols. 2794-5). As Judge Hulbert said (fol. 7294), this exhibit was in no way "impugned".

It will be noted that the City brief, without in any way denying the material allegations and arguments of the petition and brief, has misrepresented the issue sought to be reviewed. Petitioner seeks review not of the amount of an allowance for service as such, but of the erroneous theory on which the allowance was made.

II. THE COURT WAS PREVENTED FROM EXERCISING DISCRETION IN RESPECT TO PETITIONER'S SERVICES BY THE CITY'S INSISTENCE THAT ANY ALLOWANCE TO PETITIONER MUST BE RESTRICTED TO SERVICES DIRECTLY BENEFITING THE ESTATE. SUCH DEMAND NECESSARILY EXCLUDED ALL OF PETITIONER'S GENERAL COUNSEL WORK AND VIRTUALLY ALL SOLICITOR SERVICES OVER THE EIGHT-YEAR PERIOD.

At the hearing before Judge Patterson June 24, 1940 Assistant Corporation Counsel Gaud stated the City's position as to petitioner's services (fols. 319, 323):

> "A great deal was clearly rendered on behalf of Manhattan and of its stockholders. He should be compensated by his clients, and not by the receivership estate * he was representing the stock of the Company."

to which petitioner responded, although the Court refused to hear argument (fol. 326):

> "I take the positon that under the * Plan of Unification the City is under distinct obligation to pay me for *all* of my services."

The District Court held (fol. 330):

> "* * * the Plan of Unification makes provision for allowance of *receivership* charges and expenses; no purpose of charging the City with any further amounts has been shown."

At the subsequent hearing, Judge Patterson addressing petitioner said (fol. 347):

> "Have an order * permitting all matters presented under Section 8 to be deemed added to supplement your petition under Section 6."

This had reference to the first draft of the petition under Article Six, paragraph 6, which became the petition of August 29, 1940 appearing at folio 361 *et seq.* Formal leave to file the same was later granted (fol. 484).

The City's contention (pp. 5-8)—that the allowance of $20,000 for eight years' continuous labors (being one-fifth of petitioner's out-of-pocket expense incurred in the performance of the work) leaving nothing whatsoever for the services rendered—is hardly to be taken seriously as "reasonable exercise of judicial discretion".

Manhattan Railway Company was held to be an "essential party" to the receivership (fol. 293). The Company was one of the contracting parties to the Plan. It was induced to release all of its claims against the Interborough estate (Article Five, subd. 3a-b of Plan, p. 38). According to railroad engineers, these claims aggregated $60,000,000 in excess of the Company's funded debt. In addition to Manhattan cars, structures, equipment and power houses, the City took over $6,000,000 cash representing condemnation awards, fire insurance, etc., made to the Company and held in bank custody as a depository, not as trustee. The consideration to Manhattan Company was the City's solemn undertaking to assume the Company's contract obligations to petitioner for his services as general counsel and solicitor. The Plan includes the City's agreement to indemnify Manhattan Railway Company and its officers, directors and security holders from liability on account of the Company's debts and liabilities (Plan, p. 48, last paragraph). *Judge Patterson entered the receivership in February 1938* (fol. 1302) *after the greater part of petitioner's work was concluded.* It is submitted that simple justice and traditional principles of equity require that the City shall carry out its obligation.

As pointed out at page 12 of our petition the reference to exception to contracts with counsel (p. 5) does not apply; nor do the cases cited at pages 7-8 of the City's brief. *Palmer* v. *Watson,* 122 F. (2d) 598, expressly disclaimed any attempt to decide the obligation of the depositors to the Committee (p. 600). The case did not concern a corporate liability of an essential party to the cause; moreover the District Court subsequently did enforce the

contract of committee counsel against the depositing stockholders, thus recognizing that compensation contracts are enforceable under the Unification Plan.

III. The City Brief (p. 8) has erroneously interpreted the Borah Act.

The Borah Act is a statute enacted by Congress, August 25, 1937 (28 U. S. Code, Sec. 572a), and provides: *

The Act does not apply to petitioner, because: (a) Manhattan's agreement was not with "any other party" but with its own attorney; and (b) the fee was not to be paid from the receivership estate.

(a) It is only necessary to read the statute to observe that it was directed at agreements between parties, not between a party and his own attorney. When the bill to enact this statute was before the Senate, its sponsor, Senator Borah, carefully pointed this out, and proposed an amendment, accepted by the Senate, to make this wholly clear. The Senate minutes are quoted *in extenso* in *In re Trans-State Oil Co.*, 24 F. Supp. 454, 457 (S. D. Texas). On the appeal of this case *sub nom. Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (C. C. A. 5th), the Court held that *an agreement between a corporate debtor in reorganization and its attorney was not within the scope of the Act.*

(b) The agreement does not purport to relate to payments from the receivership estate. The District Court adopted this second ground in ruling the Borah Act inapplicable (fol. 7294).

---

* "It shall be unlawful for any party in interest, or any attorney for any party in interest in any receivership * * * proceeding, in or under the supervision of any court of the United States, to enter into any agreement, written or oral, express or implied, with any other party in interest * * * in such proceeding for the purpose of fixing the amount of the fees * * * to be paid to any party in interest or any attorney of any party in interest in such proceeding, for services rendered in connection therewith when such fees * * * are to be paid from the assets of the estate in receivership * * *."

IV. In reply to baseless personal attacks that have deprived petitioner of compensation for duly authorized continuous legal services which began over twelve years ago.

Excerpt from Master's Report repeated here from City brief in court below (City brief, pp. 9-10):

The City brief gives a wrong impression. As to each of the items mentioned, the Special Master merely accepted as a valid objection, the unsupported opinion of opposing counsel, and thus succeeded in defeating petitioner's right to compensation. The City's brief, filed with the Special Master, concluded as follows:

> "Franklin did not hesitate for his own gain either to manufacture evidence or to give false testimony under oath, and he is a person utterly unreliable whose testimony is not worthy of belief."

There is nothing in the record to support this gratuitous opinion of counsel. Petitioner had spent the greater part of his life in association with Frederick H. Wood, Judge Robert S. Lovett, Henry W. Clark, C. Harrison Tweed, Joseph Paxton Blair and Maxwell Evarts. The City's counsel deliberately resorted to iniquitous character assassination as the ground of its opposition. The authorities cited at page 10 of the City's brief have no application to petitioner or to any facts in this cause.

The City's personal attack provides an additional human, if not certiorari, reason for granting relief. Petitioner begs leave to briefly summarize the grounds of the City's opposition, mentioned in the Special Master's Report:

"*Ex Parte Manhattan*" (City brief, p. 10):

This objection refers to the fact that an associate (Prof. Harry Shulman of Yale University) assisted petitioner in one phase of the mandamus proceeding, and therefore holding that petitioner should be denied compensation. The facts, established by uncontradicted evidence, are these:

Petitioner himself originated the idea of the mandamus proceeding against Judge Manton (fols. 5827-30). He prepared the elaborate printed petition submitted to Judge

Augustus N. Hand, August 9, 1933 (fols. 3436-3528, cf. fols. 4921-2). Subsequently, Prof. Shulman revised the petition and submitted it to Mr. Justice Stone (fols. 5840, 6359-61). All the work was done under petitioner's supervision (fols. 5831-2). The revised petition printed in the record states (fol. 3574):

> "Prior to the filing of this petition your petitioner's counsel had taken steps toward the filing of the petition in the Circuit Court of Appeals and was advised by one of the Judges of that Court to seek relief in this Court."

Prof. Shulman's letter to petitioner reads in part: *

Petitioner testified that he was assisted in the matter by Prof. Shulman (fol. 727). The May 15th petition also mentions Prof. Shulman's assistance (fol. 37).

Ex parte Manhattan effected the removal of Judge Manton from the case. The Special Master could find no benefit in this. He said (fol. 6659):

> "There has been no satisfactory showing that a continued supervision of such Estates by Judge Manton would have resulted in less advantageous awards to the Manhattan stockholders, or in less efficient management of the Receivership Estates."

This Court had taken the view that Judge Manton "was embarrassing the receivership" (289 U. S. 505). *Ex parte Manhattan* was a unique proceeding. There were few precedents. Any conscientious lawyer, serving the best interests of his client, would certainly have obtained the ablest assistance he could contact.

Johnson case (City brief, p. 10):

The Report states that petitioner contradicted himself under cross-examination on the question of the parties be-

---

* "* * * It is of course entirely true that I was in the case only as your associate and assistant and only through your permission * * *. It is also a matter of record, and I think Mr. Gaud knows it, that you prepared the long printed petition for mandamus to the Circuit Court of Appeals, the affidavit of prejudice used in that petition and also in the petition to the Supreme Court, and that you went over the petition and brief that I drafted and that you argued before Mr. Justice Stone in New York on the motion to dissolve his restraining order" (fols. 6177-80).

hind him in the *Johnson* case. The record is entirely clear that Manhattan's board of directors adopted the suit and gave specific instructions in regard to the appeal to this Court. Petitioner reported regularly to the Board and to the stockholders on the progress of the suit (fols. 3740-2, 3746, 3750-3). The City of New York approved of petitioner's work in the *Johnson* case and filed a brief with this Court as *amicus curiae*.

Petitioner's experience (City brief, p. 9):

The Report erroneously states that petitioner's experience in general counsel work began in 1930, and that prior thereto his experience was limited to trying cases. The opposite is the fact. Petitioner was General Attorney of Southern Pacific Railway System at New York up to 1930. Prior thereto a dispute arose as to the terms on which petitioner handled litigated cases over a 7-year period from 1922 to 1929. The matter was heard by Referee John E. Joyce whose report found:

> "Plaintiff has spent 30 years in defendant's service, and performed his work with diligence, zeal and more than usual ability" (S. P. Rec., fol. 3817).

During cross-examination the City, without notice, produced the Southern Pacific printed record in the Court below (58 F. 2d 1081) which had affirmed on jurisdictional grounds. *Referee Joyce expressly found that, prior to 1930, the litigated matters were referred to outside counsel* (S. P. Rec., fol. 3766). In the entire report of Referee Joyce, there is not a word of criticism of petitioner. This unrelated case disposed of long prior to the receivership was nevertheless used as a vehicle of attack.

Adoption of July 2, 1940 resolution (City brief, p. 10):

The Report states that the resolution designated Exhibit E annexed to supplemental petition was not adopted (fols. 413-8). It is not disputed that said resolution was sent to each director of the Company, and that each approved the same (fols. 2725-32, 6212-20, 6181-204). The resolution not having been planned was oral and its precise form was left to counsel (fols. 3241, 3158-9). It was not until the replies were received that the supplemental petition of

August 29, 1940 was filed.* The opinion below declared as to this objection (p. 2447):

> "whether the Manhattan board of directors at a meeting on July 2, 1940 authorized the filing of the supplemental petition is a matter hotly disputed, but *we do not regard the issue as material.*"

The fact is, that whereas there was no provision of the Unification Plan, or of any statute, decision or rule, requiring such authorization, yet the evidence cited in the footnote showed conclusively that authorization was given.

Earnings prior to receivership (City brief, p. 9):

The Report says that petitioner's cross-examination as to his earnings from private clients, prior to the commencement of his work in the receivership, was confused and evasive. Petitioner was required to give a list of his private clients, fees paid for some 10 years past, and answered from memory. Petitioner's testimony was not controverted and was most explicit considering the lapse of time, and the fact that he had no advance notice of any such inquiry.

Compensation resolutions and contracts (City brief, p. 10):

The Report suggests inconsistency in petitioner's cross-examination as to the existing contracts with Manhattan. The criticism is unfounded. There is no dispute as to the February 8, 1934 resolution (readopted each year including 1939) retaining petitioner as general counsel and solicitor, or as to the resolutions of April 26, 1940, June 1, and June 17, 1938 or as to the contract of June 17, 1938.

---

* Petitioner testified that the resolution was adopted unanimously (fols. 2891-4). In this he was corroborated by the oral testimony of a majority of the directors, including Mr. Joyce who offered the resolution (fols. 3240-2, 3261-3), Mr. Bache who seconded the resolution (fols. 3156-8, 3160-1, 3175), Jeffers (fols. 2496-7), Russell (fols. 2425, 2429-30, 2446), Currier (fols. 3143-6, 3148-51), Pierce (fols. 2451-2), and other witnesses including Clifford Michel (fols. 3190-5) and Hernly (fols. 2523-8). Mr. Watson as the Company's president swore to this petition, to which the disputed resolution was annexed, and did not question its adoption (fols. 2377-2412).

Alleged exaggeration (City brief, p. 10):

The Report says there was exaggeration. Petitioner initiated many proceedings as events in the receivership required special action to protect the stockholders. He participated actively in several hundred matters where the Company's and stockholders' interests were directly involved, and was required to take a position. The extent of the services to the Company and its stockholders was very great.* As to the importance of the services the testimony, company resolutions and letters of the directors admitted in evidence sustain petitioner's view that the services were of large value.

As noted, these alleged objections were accepted *in toto*, and made the Special Master's rule of decision. These baseless and irrelevant attacks are answered categorically in List of Errors, filed by leave of the District Court, printed at folios 7246-68, 6864 et seq.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, New York, February 7, 1945.

Respectfully submitted,

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and pro se,
Petitioners.

---

* There were admitted in evidence all petitions and orders in the printed receivership record, all of petitioner's arguments made before the District Court during the eight-year period, and petitioner's briefs and records before this Court, the Circuit Court of Appeals, the District Court, and State Appellate Courts.

Petitioner's Exhibit 124

Statement showing Mr. Franklin's income a
expenses 1932-1940.

STATEMENT OF INCOME AND EXPENSES OFFICE OF CHARLES FRANKLIN FOR CALEN

(Note: Exclusive of disbursements for printing out of mo

	1932	*1933*	*1934*	*1935*	*1936*
Total Income* **	$43,500.00	$11,200.00—	$ 9,700.00—	$ 4,100.00—	$ 3,800.(
Office Salaries and Expenses, including Overtime	$11,424.00	$ 8,714.00—	$ 7,690.00—	$ 6,900.00—	$ 6,945.(
Printing, Binding and Stationery, and Office Equipment	4,836.28	5,871.52—	4,064.16—	3,080.00—	3,446.2
Postage and Express Charges	247.50	266.00—	259.60—	255.00—	154.2
Telephone and Telegraph	243.37	271.48—	221.44—	166.60—	149.(
Filing Fees, Railroad Fares, Maps, etc.	360.00	447.00—	247.85—	554.75—	295.(
Miscellaneous Repairs and Supplies	119.00	135.00—	107.40—	116.00—	113.2
Office Rental and Electric Light	2,110.00	2,122.00—	2,114.00—	2,096.00—	2,094.(
Water Cooler Rental	60.00	60.00—	60.00—	60.00—	60.(
Law Books, Law Journals, Dues, Subscriptions, etc.	560.00	570.00—	166.48—	190.00—	128.8
TOTALS	$19,960.15	$18,457.00—	$14,930.91—	$13,418.35—	$13,386.(
	43,500.00	11,200.00—	9,700.00—	4,100.00—	3,800.(
INCOME SHOWING PROFIT OR LOSS	$23,539.85 *Profit*	$ 7,257.00— *Loss*	$ 5,230.91— *Loss*	$ 9,318.35— *Loss*	$ 9,586.(*Loss*

* Amount received includes payment of $3,000 per annum for attending to Company's transfers of stock by fiduciaries, etc.

**

[Cf. Judge Hulbert's opinion (fol. 7295). The $20,000 allowed by Judge I representing Mr. Franklin's interest in the allowance to the solicitors for the Mod mately cover the office deficit. But $7,500 of the $35,000 was withheld on a cl settled at a cost to Mr. Franklin of about $4,000. Hence the actual realization the Circuit Court of Appeals has been largely consumed in this litigation.]

ibit 124.

ncome and office overhead
1940.

OR CALENDAR YEARS 1932 TO AND INCLUDING FIRST HALF OF 1940.

out of moneys advanced by directors.)

1936	*1937*	*1938*	*1939*	*6 mos. 1940*	*Totals*
$ 3,800.00—	$ 4,500.00—	$ 4,000.00—	$ 3,900.00—	$ 2,900.00—	$44,100.00
$ 6,945.60—	$ 7,100.00—	$ 6,500.00—	$ 4,925.00—	$ 2,562.50—	$51,337.10
3,446.21—	2,703.28—	3,135.93—	2,757.94—	922.48—	25,981.50
154.20—	118.40—	127.50—	216.70—	113.60—	1,511.00
149.03—	184.40—	142.60—	146.90—	78.35—	1,360.80
295.00—	434.85—	195.40—	126.50—	———	2,501.35
113.55—	115.00—	21.00—	20.70—	17.50—	646.15
2,094.00—	2,086.00—	1,280.00—	1,272.00—	647.30—	13,711.30
60.00—	60.00—	———	———	———	300.00
128.88—	112.00—	98.40—	90.50—	54.00—	1,410.26
$13,386.47—	$12,913.93—	$11,500.83—	$ 9,556.24—	$ 4,395.73—	$98,559.46
3,800.00—	4,500.00—	4,000.00—	3,900.00—	2,900.00—	44,100.00
$ 9,586.47— *Loss*	$ 8,413.93— *Loss*	$ 7,500.83— *Loss*	$ 5,656.24— *Loss*	$ 1,495.73— *Loss*	$54,459.46 *Loss*

** Appointed solicitor for Manhattan Railway Company December 31, 1932 and elected General Counsel November 11, 1932. The profit of $23,539.85 not included in calculating net loss during period.

Judge Patterson under the decree of July 3, 1940, and $35,000 the Modified Stock Committee (fols. 2263, 3025), would approxi- on a claim of an assistant lawyer (fols. 4812-3), subsequently lization was less than the office deficit. The $15,000 allowed by n.]